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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSHUA LEE STANLEY,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 18A02-0703-CR-235

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APPEAL FROM THE DELAWARE CIRCUIT COURT  
The Honorable Marianne L. Vorhees, Judge  
Cause No. 18C01-0605-FB-11

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**October 9, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Joshua Lee Stanley appeals the ten-year sentence that was imposed following his guilty plea to Burglary,<sup>1</sup> a class B felony. Specifically, Stanley argues that his sentence was “manifestly unreasonable”<sup>2</sup> because the trial court failed to identify several mitigating circumstances that were apparent from the record. Stanley also contends that the trial court improperly identified an element of the offense as an aggravating circumstance. Finding no error, we affirm the judgment of the trial court.

### FACTS

On the evening of May 15, 2006, Stanley and three of his friends broke into Samuel Vaughn’s Muncie residence while Vaughn and his family were sleeping. Numerous items were taken, including DVDs, Play Station games, money, pills, a computer, and Vaughn’s cell phone.

As a result of the incident, Stanley was charged with burglary, conspiracy to commit burglary, theft, and possession of a controlled substance. Thereafter, on November 27, 2006, Stanley and the State negotiated a plea agreement, which provided that Stanley would plead guilty to burglary in exchange for dismissal of the remaining charges. It was also agreed that Stanley’s sentence would be capped at ten years.

The trial court accepted the plea agreement and sentenced Stanley to ten years of incarceration with two years suspended to probation. In arriving at the sentence, the trial

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<sup>1</sup> Ind. Code § 35-43-2-1.

<sup>2</sup> We no longer review the propriety of a sentence under the manifestly unreasonable standard. Rather, pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence authorized by statute if, “after due

court identified Stanley’s criminal history—which consisted of a misdemeanor conviction for domestic battery in 2005—and the fact that he was on probation when he committed the instant offense, as aggravating circumstances. The trial court also found that Stanley’s remorse and guilty plea were mitigating factors. The trial court then determined that the aggravating and mitigating circumstances balanced and that any sentence less than the ten-year advisory sentence<sup>3</sup> would depreciate the seriousness of the offense. Stanley now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

We initially observe that sentencing decisions are within the trial court’s discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). So long as the sentence imposed is within the statutory range, the trial court’s sentencing determination will be reversed only for an abuse of discretion. Id. An abuse of discretion occurs where the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id. However, this court may revise an otherwise proper sentence where, after due consideration of the trial court’s

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consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.”

<sup>3</sup> Ind. Code section 35-50-2-5 provides in part that “[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.”

sentencing determination, it finds that the sentence imposed is inappropriate in light of the nature of the offense and the defendant's character. Ind. Appellate Rule 7(B). The defendant carries the burden to convince the appellate court that the sentence imposed is inappropriate. Id. at 494.

## II. Failure to Identify Mitigating Factors

Stanley first argues that his sentence must be set aside because the trial court abused its discretion in failing to identify his young age, drug addiction, and the fact that he had not previously committed a felony, as mitigating factors. As a result, Stanley claims that he was entitled to a reduced sentence.

At the outset, we note that Stanley has failed to present a cogent argument or citation to relevant authority in support of these claimed mitigators, and he only mentions in the summary of the argument portion of his appellate brief that his age should have been considered as a mitigating factor. Thus, the issue is waived. Noyd v. State, 866 N.E.2d 855, 856 n.1 (Ind. Ct. App. 2007). Stanley's claims are waived for the additional reason that they were not advanced as mitigating circumstances to the trial court. Tr. p. 10-12, 13. See Anglemyer, 868 N.E.2d at 492 (holding that the failure to raise an alleged mitigating circumstance in the trial court constitutes a waiver of the claim on appeal).

Waiver notwithstanding, we note that an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). In other words, a trial court is not obligated to find a circumstance to be

mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked that factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

With regard to Stanley's contention that the trial court should have found his substance abuse to be a mitigating factor, we note that a trial court may find drug addiction to be an aggravating circumstance. See Burgess v. State, 854 N.E.2d 35, 40 n.5 (Ind. Ct. App. 2006) (upholding trial court's determination that the defendant's risk of re-offending was a valid aggravator because of his methamphetamine addiction). In this case, the record shows that Stanley has abused substances for much of his life, including methadone, marijuana, morphine, vicodin, and heroin. Appellant's App. p. 54. Indeed, Stanley's repeated illegal substance abuse demonstrates that he has violated the law with impunity for many years. Moreover, Stanley was aware of his substance abuse problem but did virtually nothing to alleviate the problem. Id. at 5, 71. As a result, we cannot say that the trial court abused its discretion when it did not identify Stanley's substance abuse as a mitigating factor. See Bryan v. State, 802 N.E.2d 486, 501 (Ind. Ct. App. 2004) (holding that when a defendant is aware of his substance abuse problem but has not taken proper steps to treat it, addictive behavior may be considered as an aggravating rather than a mitigating circumstance).

As for Stanley's assertion that his young age should have been identified as a mitigating circumstance, we note that Stanley was twenty-one years old when he committed these offenses. Appellant's App. p. 9. In Corcoran v. State, 774 N.E.2d 495, 500 (Ind.

2002), our Supreme Court determined that the trial court properly refused to identify the twenty-two-year-old defendant's age as a mitigating factor. Indeed, the Corcoran court observed that the defendant was "well past the age . . . where the law requires special treatment." Id.; see also Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App. 2003) (same). Stanley is not a naïve child or an immature teenager. Rather, he is an adult able to take responsibility for his actions. Thus, the trial court did not abuse its discretion in not considering Stanley's age to be a mitigating factor.

Stanley also maintains that the trial court erred in refusing to identify the lack of any prior felony convictions as a mitigating circumstance. Notwithstanding this claim, we have determined that a felony-free criminal history is not entitled to significant mitigating weight when the defendant's record is blemished. Stout v. State, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), trans. denied. Here, Stanley had a misdemeanor conviction for domestic battery and was on probation at the time he committed this offense. Moreover, a defendant's criminal history consisting only of misdemeanor offenses can be considered an aggravating circumstance. Carlson v. State, 716 N.E.2d 449, 473 (Ind. Ct. App. 1999). Hence, Stanley's claim fails.

### III. Improper Aggravating Circumstance

Stanley next claims that the trial court improperly identified an element of the offense as an aggravating factor. Specifically, Stanley maintains that the trial court erred in using "the fact that the Defendant entered the victim's home" as an aggravating circumstance. Appellant's Br. p. 7.

Stanley correctly observes that while a trial court may not use a material element of the crime as an aggravating factor, it may consider the particularized nature and circumstances of the offense. Lemos v. State, 746 N.E.2d 972, 975 (Ind. 2001). However, it is apparent that Stanley misperceives the trial court's use of this circumstance. In particular, the trial court referenced Stanley's entry into the residence to emphasize the seriousness of the offense to explain why a sentence below the advisory term was not warranted. Tr. p. 15-16. In other words, the trial court identified this factor as a justification for its determination that a reduced sentence would depreciate the seriousness of the offense. The trial court was entitled to do so in light of Stanley's argument that he was entitled to a sentence below the advisory term. Kirby v. State, 746 N.E.2d 440, 444 (Ind. Ct. App. 2001) (observing that the trial court properly used this factor to support its refusal to reduce the presumptive sentence). Hence, Stanley's claim fails.

In sum, Stanley does not prevail on his contentions that the trial court overlooked certain mitigating circumstances or improperly identified an aggravating factor in arriving at the sentence.<sup>4</sup>

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<sup>4</sup> We note that Stanley does not make any additional argument that the sentence was inappropriate pursuant to Indiana Appellate Rule 7(B). Even so, when considering Stanley's prior misdemeanor conviction, the fact that he committed these offenses while on probation, and his extensive abuse of alcohol and illegal substances, it is apparent that he has not been deterred from engaging in criminal conduct. Therefore, we can only conclude that the ten-year advisory sentence for this offense was not inappropriate when considering the nature of the offense and Stanley's character pursuant to Indiana Appellate Rule 7(B). See Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003) (holding that sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision and we refrain from merely substituting our judgment for that of the trial court).

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.